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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1977

Number A-451

NEW MOTOR VEHICLE BOARD OF THE STATE OF CALIFORNIA, and the DEPARTMENT OF MOTOR VEHICLES OF THE STATE OF CALIFORNIA, and HERMAN SILLAS, as Director of the Department of Motor Vehicles of the State of California,

Appellants,

v.

ORRIN W. FOX CO. a corporation; MULLER CHEVROLET, a corporation; and GENERAL MOTORS CORPORATION,

Appellees.

On Appeal From the United States District Court for the Central District of California

Jurisdictional Statement of Appellants New Motor Vehicle Board of the State of California, Department of Motor Vehicles of the State of California and Herman Sillas, as Director of the Department of Motor Vehicles of the State of California

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ORRIN W. FOX CO. a corporation; MULLER CHEVROLET, a corporation; and GENERAL MOTORS CORPORATION,
Appellees.

JURISDICTIONAL STATEMENT

Appellants New Motor Vehicle Board of the State of California, Department of Motor Vehicles of the State of California, and Herman Sillas, as Director of the Department of Motor Vehicles of the State of California, appeal from the Summary Judgment of the United States District Court for the Central District of California entered on September 15, 1977, and from that Court's Partial Summary Judgment, entered on October 19, 1977, each declaring violative of due process of law under the Fourteenth Amendment to the United States Constitution the provisions of the California Automobile Franchise Act (Cal. Veh. Code §§ 3060–3069) relating to establishment and relocation

of franchised motor vehicle dealerships, and enjoining enforcement of those provisions by appellants. The within statement is submitted to demonstrate that this Honorable Court possesses jurisdiction over this appeal and that the substantiability of the federal questions herein presented warrants immediate consideration and disposition by the Court.

OPINION BELOW

The opinion of the United States District Court for the Central District of California, filed on September 14, 1977 in Civil Action No. 76-1212, WPG, has not been reported and is annexed hereto as "Exhibit A" of the Appendix.

JURISDICTION

The action below was commenced by a Complaint for Declaratory Relief and Injunction, filed on April 13, 1976, alleging jurisdiction and venue in the United States District Court for the Central District of California under 28 U.S.C. §§ 1331(a), 1337, 1343(3), 1391(b) and 2201.

A three-judge court, constituted by the Honorable Walter Ely, Circuit Judge, and the Honorable William P. Gray and the Honorable Robert M. Takasugi, District Judges, was convened pursuant to 28 U.S.C. §§ 2281 and 2284. Following entry of a Summary Judgment adverse to appellants on September 15, 1977, appellant New Motor Vehicle Board filed a Notice of Appeal on October 13, 1977. Appellants Sillas and the

Department of Motor Vehicles filed a Notice of Appeal on October 18, 1977. Following entry of a new Partial Summary Judgment on October 19, 1977, correcting the original Summary Judgment under Rule 60(a) of the Federal Rules of Civil Procedure, appellants Sillas and the Department of Motor Vehicles and appellant New Motor Vehicle Board noted their appeals therefrom on November 17, 1977, and November 21, 1977, respectively. The District Court's Summary Judgment, entered September 15, 1977, and the notices of appeal therefrom, filed by appellants New Motor Vehicle Board and Sillas, are annexed hereto, respectively designated exhibits B, C and D to the Appendix. The District Court's Partial Summary Judgment, entered October 19, 1977, and the Notices of Appeal of Appellants Department of Motor Vehicles and Sillas, and of the New Motor Vehicle Board, are annexed and respectively designated as exhibits E, F, and G to the Appendix.

Jurisdiction of this Honorable Court is invoked pursuant to 28 U.S.C. §§ 1253 and 2101(b), authorizing direct appeal to the United States Supreme Court from an order granting an interlocutory or permanent injunction in a civil suit required by 28 U.S.C. § 2281 to be heard and determined by a district court of three judges.

QUESTIONS PRESENTED

1. Whether due process of law requires that state-mandated delay to proposed commercial

activities pending evidentiary inquiry by the State into objections to the proposed activity, be preceded or accompanied by an evidentiary hearing on the merits of the objection giving rise to the delay thus imposed.

2. Whether this Court's decisions in *Harris County Commissioners Court* v. *Moore* (1975) 420 U.S. 77 and *Bellotti* v. *Baird* (1976) 428 U.S. 132, among others, required the District Court to abstain from determining plaintiffs' claims upon the foregoing federal constitutional question, where the state statute was and is susceptible to at least three interpretations which would at least substantially modify the present federal Constitutional challenge to the statute.

STATUTES INVOLVED

The California Automobile Franchise Act, codified as sections 3060–3069 of the California Vehicle Code, is the subject of this suit and is set forth in full as exhibit H of the Appendix.

PRELIMINARY STATEMENT AND SUMMARY OF THE CASE

The State of California has regulated the business of marketing motor vehicles for nearly sixty years.[1] Relatively recently California has exercised its police power to regulate business relations between the manufacturing and retail sales levels of the motor vehicle marketing business.

In 1973, pursuant to a declared legislative purpose "to avoid undue control of the independent new motor vehicle dealer by the vehicle manufacturer or distributor and to insure that dealers fulfill their obligations under their franchises and provide

[1] Ever since enactment of California's Vehicle Act of 1923, for example, dealers and manufacturers of motor vehicles have been authorized through a special exemption from the vehicle registration requirements of the State, to operate motor vehicles on the public highways in connection with their respective businesses. (Cal. Stats. 1923, ch. 266, § 46(a).) In order to secure this exemption from the generally-applicable registration requirements, dealers and manufacturers were required to apply for certification and special identifying license plates. (Cal. Stats. 1923, ch. 266 § 46(b).)

In 1957, the former certification procedure became a licensing provision, and all automobile manufacturers were required to apply for licenses in order to qualify for and continue to hold the registration exemption. (Cal. Veh. Code (1957) § 201.) In addition, it became unlawful on and after October 1, 1957, to act as a dealer (though not as a manufacturer) without first having procured such a license from the Department of Motor Vehicles. (Cal. Veh. Code (1957) § 200.)

The prohibition on unlicensed activity was extended to manufacturers and motor vehicle transporters by Cal. Stats. 1967, ch. 557, § 2. Henceforward, it would be unlawful for any person to act as a dealer, manufacturer, or transporter of motor vehicles without a valid license and certificate issued by the Department of Motor Vehicles. (Cal. Veh. Code § 11700.)

adequate and sufficient service to consumers generally" (Cal. Stats. 1973, ch. 996, § 1), the State of California enacted new requirements substantially affecting several areas of business relations between motor vehicle franchisors and franchisees,[2] and simultaneously established a New Motor Vehicle Board of nine members (Cal. Veh. Code § 3000) empowered to make binding determinations between franchisors and franchisees concerning those requirements.

The 1973 legislation, referred to throughout this litigation as the California Automobile Franchise Act, or "the Act," created numerous new requirements affecting modification, replacement and termination of franchises delivery and preparation obligations of franchisees, and warranty reimbursement practices of franchisors. Most important to the instant case, the Act imposes specific procedural requirements upon a franchisor which seeks to enter into a franchise establishing an additional motor vehicle dealership or relocating an existing motor vehicle dealership within or into a relevant market area,[3] where the same

[2] California Vehicle Code sections 331.1 and 331.2, respectively, define "franchisee" and "franchisor" as follows:

"§331.1. A 'franchisee' is any person who, pursuant to a franchise, receives new motor vehicles subject to registration under this code from the franchisor and who sells such vehicles at retail.

§331.2. A 'franchisor' is any person who manufactures, assembles, or distributes new motor vehicles subject to registration under this code and who grants a franchise."

[3] California Vehicle Code section 507 provides:

"The 'relevant market area' is any area within a radius of 10 miles from the site of a potential new dealership."

line-make of motor vehicle is currently represented. Under the Act the franchisor is required to provide written notification to both the New Motor Vehicle Board and each franchisee in the relevant market area. Within fifteen days of receipt of the notification any franchisee entitled to notice may file with the Board a protest against the franchisor's intended action. Upon the filing of such protest, the Board is required to inform the franchisor that the protest has been filed, that a hearing is required to be held pursuant to specific provisions of the Act, and that the franchisor shall not establish or relocate the proposed dealership until the Board has held the required hearing, nor thereafter if the Board should determine that good cause exists for not permitting such dealership. (Cal. Veh. Code § 3062.)

Upon issuance of the foregoing notification, the Board must order a hearing to be held within 60 days from the date of that order and by copy thereof, must so notify the franchisor, the protesting franchisee, and all individuals or groups which have requested notification of protests and decisions of the Board. (Cal. Veh. Code § 3066 subd. (a).) The procedures under which the hearing is conducted are prescribed by reference to specific provisions of the California Administrative Procedure Act. (Cal. Gov. Code § 11500 et seq.) In protests against establishment or relocation of motor vehicle dealerships, the burden of proof is upon the franchisee to establish that good cause exists *not* to permit the proposed action of the franchisor.

(Cal. Veh. Code § 3066 subd. (b).)

The elements of proof which the protesting franchisee must establish are identified in California Vehicle Code section 3063, which provides:

> "In determining whether good cause has been established for not entering into or relocating an additional franchise for the same line-make, the board shall take into consideration the existing circumstances, including, but not limited to:
>
> "(1) Permanency of the investment.
>
> "(2) Effect on the retail motor vehicle business and the consuming public in the relevant market area.
>
> "(3) Whether it is injurious to the public welfare for an additional franchise to be established.
>
> "(4) Whether the franchisees of the same line-make in that relevant market area are providing adequate competition and convenient consumer care for the motor vehicles of the line-make in the market area which shall include the adequacy of motor vehicle sales and service facilities, equipment, supply of vehicle parts, and qualified service personnel.
>
> "(5) Whether the establishment of an additional franchise would increase competition and therefore be in the public interest."

The decision of the Board must be in writing and must contain findings of fact and a determination of the issues presented. Except under specified circumstances, the Board must act within 30 days after either the hearing or the date the Board receives the hearing officer's proposed decision, as the case may be. If the Board does not act within the requisite time, the

proposed action of the franchisor is deemed approved. (Cal. Veh. Code § 3067.)

General Motors Corporation, a franchisor under the terms of the Act, and two of its dealers in Southern California, filed a Complaint for Declaratory Relief and Injunction on April 13, 1976, seeking a declaration of the Act's unconstitutionality and an injunction restraining enforcement of the Act's provisions by the New Motor Vehicle Board, the Department of Motor Vehicles, the Department's director, and their respective agents. Among the plaintiffs' contentions was the allegation that the statutory procedure described above violated due process under the Fourteenth Amendment to the United States Constitution by "enjoining" proposed actions of manufacturers and their existing and potential franchisees without opportunity for a prompt hearing and decision on the merits of dealer protests and without requiring a showing of good cause prior to issuance of the "injunction." (Complaint, p. 4, ¶ 3(b).)

Because the suit sought to restrain state officers in the enforcement of a state statute, a three-judge court was convened under 28 U.S.C. §§ 2281 and 2284.

Appellant New Motor Vehicle Board filed a motion to dismiss the suit predicated in part on the ground that the doctrine of abstention under *Railroad Commission* v. *Pullman Company* (1941) 312 U.S. 946, required that exercise of federal jurisdiction be withheld. Plaintiffs thereafter filed a motion for partial summary judgment predicated in part upon the due process contentions

identified *supra*. Both motions were argued to the Court, after full briefing, on September 20, 1976.

On September 14, 1977, the District Court filed its opinion and judgment. The opinion (Exhibit A) held that the Act violated the Due Process Clause of the Fourteenth Amendment by depriving plaintiffs of liberty and property without prior notice and opportunity to be heard, and by failing to provide for a prompt hearing after the initial deprivation. The opinion rejected the Board's contention that the District Court should abstain from deciding the federal questions presented until unresolved issues of state law had been determined by the state courts. Following a conference with counsel, the Court on October 18, 1977, filed a corrected judgment denying the Board's motion to dismiss and granting plaintiffs-appellees' motion for partial summary judgment. The corrected judgment declared the relocation and establishment provisions of the Act unconstitutional for the reasons discussed in the opinion, and enjoined enforcement of those provisions of the Act by defendants.

THE QUESTIONS BEFORE THE COURT ARE SUBSTANTIAL

1. *A state regulatory statute does not violate due process of law merely because it mandates delay of proposed commercial activities pending state inquiry in the public interest, without requiring a hearing prior to or accompanying initial imposition of such delay.*

In holding the motor vehicle franchise relocation

and establishment provisions of California's Automobile Franchise Act a denial of due process, the District Court has transplanted into the sphere of commercial regulation a particular hearing requirement which this Court's previous teaching has confined to deprivations of recognized entitlements to property and individual liberties.

Without extended discussion of the rights of which plaintiffs are said to be denied the District Court declared, upon the basis of the hearing requirements held necessary in *Sniadach* v. *Family Finance Corp.* (1969) 395 U.S. 337 and *Fuentes* v. *Shevin* (1972) 407 U.S. 67, that the Automobile Franchise Act violates due process of law by failing to provide for a hearing before or while requiring plaintiffs to defer consummation of their commercial ventures pending inquiry by the New Motor Vehicle Board.

But the inchoate liberty interest which the District Court held to be curtailed, and the unidentified property interest of which plaintiffs are said to be deprived by the Act, are without constitutional status requiring recognition under the Fourteenth Amendment. As this Court has recently reiterated:

> "It is apparent from our decisions that there exist a variety of interests which are difficult of definition but are nevertheless comprehended within the meaning of either 'liberty' or 'property' as meant in the Due Process Clause. *These interests attain this constitutional status by virtue of the fact that they have been initially recognized and protected by state law,* and we have repeatedly ruled that the

procedural guarantees of the Fourteenth Amendment apply whenever the State seeks to remove or significantly alter that protected status." *Paul* v. *Davis,* (1976) 424 U.S. 693, 710–711. Emphasis added.

Under these circumstances, the District Court's broad declaration that "*the plaintiffs had a constitutional right to do what they wanted to do,* subject only to the restrictions of due process herein discussed" (Exhibit A, p. 38, emphasis added) is truly startling in its departure from the repeated teaching of this Court, for, while determining the suit as a matter of non-final deprivation of protected rights, the District Court plainly recognized the gravamen of the issues tendered to be the delay to consummation of plaintiffs' business enterprises, occasioned by the State's regulatory function. (Exhibit A, pp. 33–35)

As a vindication of the "liberty" of business entities to proceed unfettered by delays attendant upon regulation, the District Court's opinion is plainly at war with this Court's consistent teaching of more than a generation. Since at least as early as this Court's decision in *Semler* v. *Oregon State Board of Dental Examiners* (1935) 294 U.S. 608, it has been established that state regulation of business, even when it constitutes an intrusion into the manner in which an individual may practice his profession, does not itself amount to "an arbitrary interference with liberty and property and thus violate the requirement of due process of law." (294 U.S. at 611.) Plaintiffs thus possess no right to be free from the regulatory hand of the

State. Indeed, so well settled is the foregoing proposition that in 1955, this Court held unequivocally that "[t]he day is gone when this Court uses the Due Process Clause of the Fourteenth Amendment to strike down state laws, regulatory business and industrial conditions, because they may be unwise, improvident, or out of harmony with a particular school of thought. [Citations omitted]" *Williamson* v. *Lee Optical of Oklahoma* (1955) 348 U.S. 483, 488 reh. den. 349 U.S. 925.

By engrafting onto the state's regulation of motor vehicle franchises the requirement of a prior hearing identified in the *Sniadach* line of decisions, the District Court has held in effect that the state must provide a hearing before it may make itself take the time to regulate. This Court has never countenanced that proposition. Indeed, it has long been established, in treating of regulatory measures enacted in aid of the public interest, that when a hearing is required under administrative procedures:

> "The demands of due process do not require a hearing, at the initial stage or at any particular point or at more than one point in an administrative proceeding so long as the requisite hearing is held before the final order becomes effective." *Opp Cotton Mills* v. *Administrator of Wage & Hour Division* (1941) 312 U.S. 126, 152.

Even when the regulatory measure results in confiscation of tangible property, the rule is not otherwise. In *Ewing* v. *Mytinger & Casselberry, Inc.,* (1950) 339 U.S. 594 reh. den. 340 U.S. 857, this Court

elaborated upon the requirements of due process as they affect the timing of a hearing where administrative discretion, as opposed to ministerial adherence to the statutory requirement involved in the present case, was authorized. In addressing the discretion vested in an administrator to effectuate an outright seizure of property incident to commencement of judicial enforcement proceedings, this Court stated:

> "Discretion of any official may be abused. Yet it is not a requirement of due process that there be judicial inquiry before discretion can be exercised. It is sufficient, where only property rights are concerned, that there is at some stage an opportunity and a judicial determination [Citations omitted]" 399 U.S. at 599.

Exactly how far the District Court's opinion has borne the requirement of a prior hearing from the logical limits of its legal origins is demonstrated by reference to *Fuentes* v. *Shevin, supra,* upon which the District Court explicitly relied. (Exhibit A, p. 36.) In *Fuentes, supra,* this Court specifically found that the Florida and Pennsylvania prejudgment replevin statutes which it invalidated served no important governmental or general public interest, permitting "summary seizure of a person's possessions when no more than private gain is directly at stake" 407 U.S. at 92. In *Fuentes,* moreover, the Court specifically acknowledged that when necessary to secure an important governmental or general public interest, even an outright seizure of property need not

necessarily be preceded by a hearing. (407 U.S. at 90–92; *see also, Calero-Toledo v Pearson Yacht Leasing Co.* (1974) 416 U.S. 663, 678–680.) In the present case, by contrast, the public interest served by the Automobile Franchise Act is unquestioned by the District Court; yet, on the assumption that a property interest *per se* is at stake in the delay imposed by regulation, the District Court, apparently without more, would require that a hearing on the merits of the proposed commercial enterprise precede the exercise of regulatory authority by the state.

Assuming that some cognizable property interest *is* substantially impaired by the operation of the Act, and that a hearing is thus required at *some* point before a final deprivation occurs, this Court's recent decision in *Mathews* v. *Eldridge* (1976) 424 U.S. 319 plainly demonstrates the inapplicability of the procedural requirement of a prior hearing to the degree of potential deprivation of property involved in this case. In *Eldridge, supra,* this Court, in reaffirming the necessity for some form of hearing before an individual is permanently deprived of a property interest, nonetheless refused to require an evidentiary adjudication of a disabled worker's right to continued disability benefits prior to discontinuation of such benefits by the Social Security Administration. (424 U.S. at 339–343.)

Professor Kenneth Culp Davis, in the 1977 supplement to *Administrative Law of the Seventies* (1976), has succinctly contrasted the key elements of

the *Eldridge* decision with those of this Court's earlier decision in *Goldberg* v. *Kelly* (1970) 397 U.S. 254, which, under the authority of *Sniadach, supra,* had required an evidentiary hearing to precede discontinuation of welfare benefits. With respect to the degree of potential deprivation as a determinant in the disparate results in the two decisions, Davis observes, in relevant part:

> ". . . In both Goldberg and Eldridge, the recipient of payments of public money was unquestionably entitled to an evidentiary hearing before *permanent* termination of the payments, and the question in both cases was whether payments could be terminated before such a hearing or only after such a hearing. The Goldberg case held that due process required opportunity for such a hearing before termination of payments under the program of aid to families of dependent children. The Eldridge case held that procedure short of an evidentiary hearing satisfied due process for terminating disability payments. *The main difference, but not the only difference, was that welfare payments may be "the very means by which to live," whereas disability payments, the Court said in Eldridge, are 'not based upon financial need.'* 424 U.S. at 340. . . ." (Davis, 1977 Supplement to *Administrative Law of the Seventies,* § 7.00-1-1, supplement pp. 84–85. Emphasis added.)

The District Court's opinion not only ignores the differences suggested by *Eldridge, supra,* between interests amounting to "the very means by which to live" and interests of other, lesser orders, but utterly

disregards the magnitude of interests at stake as a constitutional determinant of the nature and timing of such hearing as due process may require. As a result, the District Court's opinion requires that an evidentiary hearing precede all delay of commercial expectancies of motor vehicle franchisors, even though due process requires no such hearing before discontinuation of so fundamental an interest as monthly payments to a disabled worker.

If not reversed, the District Court's opinion and judgment will not constitute a merely anomalous legal curiosity, but will rather stand for the dubious doctrine that however necessary the State's regulation of a proposed commercial activity, a hearing must precede all delays which attend consummation of the business expectancy so regulated.

2. *The District Court was required, under this Court's decisions in Harris County Commissioners Court v. Moore (1975) 420 U.S. 77 and Bellotti v. Baird (1976) 428 U.S. 132, among others, to abstain from determining the federal issues tendered by plaintiffs' summary judgment motion.*

Notwithstanding the existence of issues of state law whose resolution in the State forum would at the very least substantially modify the federal issues dealt with by the District Court (*Bellotti, supra,* 428 U.S. at 147–148), the opinion below treated the question of abstention as one of deference to state courts for resolution of the *federal* issues presented (*Younger* v. *Harris* (1971) 401 U.S. 37), and declined to so defer

because no state court had yet dealt with those federal issues. (Exhibit A, pp. 38–39.) The District Court's consideration of the propriety of abstention under *Railroad Commission* v. *Pullman Company, supra,* (1941) 312 U.S. 946, was apparently limited to absence of ambiguities in the Act itself, thus ignoring the clear teaching of *Harris County Commissioners Court, supra,* that it is the existence of unsettled state law questions, not necessarily a statute ambiguous on its face, upon which the propriety of abstention depends. (420 U.S. at 86–88.)

The propriety of abstention does not depend upon whether or how a state court may decide the federal constitutional issue raised here. The dispositive question with which the Court has failed to treat, is whether action by the State judiciary may either (1) render exercise of federal jurisdiction unnecessary by resolving issues presented on the basis of state law or by a narrowing construction of the state statute, avoiding the necessity of litigation of federal issues, or (2) modify or define the federal issues here presented, so as to aid the federal forum in a subsequent exercise of jurisdiction. As this Court stated in ordering abstention in *Harris County Commissioners Court* v. *Moore, supra:*

> "Among the cases that call most insistently for abstention are those in which the federal constitutional challenge turns on a state statute, the meaning of which is unclear under state law. *If the state courts would be likely to construe the statute in a fashion that would avoid the need for a federal*

> *constitutional ruling or otherwise significantly modify the federal claim, the argument for abstention is strong.* (See Kusper v. Pontikes, 414 U. S. 51 (1973); Lake Carriers' Assn. v. MacMullan, supra; Harman v. Forssenius, 380 U. S. 528 (1965); Harrison v. NAACP, supra [360 U.S. 167 (1959)]." (420 U.S. at 84; emphasis and bracketed language added.)

In the court below, appellants demonstrated both a likelihood of a state court construction of the Act which would avoid necessity of a federal constitutional ruling and a likelihood that a state construction would substantially modify the federal issue presented here.

First, as appellants demonstrated in their Motion to Dismiss below, it is likely that the California courts may, as a matter of state law, imply a requirement of an evidentiary hearing in connection with issuance of the Board's notification to the franchisor under Vehicle Code section 3062, even though the statute itself makes no specific mention of a hearing for that purpose.

When a protest is filed against a proposed franchisor action under California Vehicle Code section 3062, appellant New Motor Vehicle Board is required to issue a written notification informing the franchisor that the proposed action is prohibited until a hearing is held and the protest determined. As discussed *supra,* because the District Court believed the prohibition and its attendant delay to constitute a deprivation of liberty and property, it held that the Act denies due process inasmuch as it contains no provision for a hearing prior to issuance of its notification under section 3062.

In dealing with a statute which similarly contained no explicit requirement for a hearing, the California Supreme Court in *Endler* v. *Schutzbank* (1968) 68 Cal.2d 162, required the State Commissioner of Corporations to "fashion" an appropriate hearing procedure for a private brokerage employee ordered discharged by the Commissioner. The Court observed that there was no question that the Commissioner had the power to provide for such a hearing under the governing statute. (68 Cal.2d at 182, fn.17.) Judge Warren Deering, a leading commentator on California administrative law, has observed that under such circumstances, "the decision in Endler v. Schutzbank (1968) 68 Cal.2d 162, . . ., indicates the courts will search the governing statute to find the necessary authority for the agency to provide a hearing. See also, Rios v. Cozens (1972) 7 Cal.3d 792, . . ., vacated and remanded (1973) 41 U.S.L.W. 3461, 93 S.Ct. 1019, 35 L.Ed 2d 398, reaffirmed, 9 Cal.3d 454, . . ." (Deering, *California Administrative Mandamus* (1977 Supp.), § 2.5, p. 7.)

The circumstances recognized by the California Supreme Court and identified by Judge Deering are present here. The Act provides the New Motor Vehicle Board the necessary power to afford parties a hearing prior to issuance of the Board's notification to the franchisor, should a state court imply the requirement of such hearing as a matter of state law. California Vehicle Code section 3067, through its incorporation by reference of the several provisions of the California

Administrative Procedure Act (Cal. Gov. Code § 11500 et seq.) provides the administrative blueprint for protest hearing procedure whenever such hearings are authorized. A determination that state law requires a hearing prior to issuance of the Board's notification would, of course, result in complete avoidance of the federal constitutional question involved in the instant decision. *Reetz* v. *Bozanich* (1970) 397 U.S. 82, 86–87.

Secondly, the Automobile Franchise Act additionally provides both the means and the statutory authority to afford parties an evidentiary hearing promptly after issuance of the Board's notification to the franchisor under section 3062, should such a hearing be deemed required. Assuming *arguendo* the correctness of the District Court's construction of section 3066, subdivision (a), as requiring the New Motor Vehicle Board to order a hearing concurrently with its issuance of notification to the franchisor, a protest hearing under the governing statute could be held as soon after promulgation of the order as a state court may hold is consistent with the requirements of due notice. For example, if a state court were to hold as a matter of state law that a hearing must occur within three days, five days, or ten days after issuance of the Board's notification to the franchisor, the constitutional question of the necessity of a *prior* evidentiary hearing may be either avoided, or substantially altered, by, among other things, the short duration of the delay considered in light of the substantiality of the private and public interests being affected. (See *Mathews* v.

Eldridge (1976) 424 U.S. 319, 332–335, 347–349.) Whether Board procedures afford an opportunity to be heard "at a meaningful time and in a meaningful manner" (*Armstrong* v. *Manzo* (1965) 380 U.S. 545, 552) would then be an issue subject to federal determination upon a basis "that is a complete product of the state, the enactment as phrased by its legislature and as construed by its highest court." (*Harrison* v. *N.A.A.C.P.* (1959) 360 U.S. 167, 178.)

Thirdly, a state court may construe the language of the Act as requiring the franchisor to give its franchisees and the Board advance notice of it proposed actions.

The Act requires that the franchisor notify its franchisees and the Board "in the event" that it proposes to relocate or establish a dealership (Cal. Veh. Code § 3062), but does not specify a point in time when such notification must be made. Thus, the franchisor at present enjoys exclusive control over the time when the Act's provisions commence to apply (Cal. Veh. Code § 3062). In the present case, as was pointed out to the District Court and to this Court on application for a stay of the judgment below, plaintiff General Motors issued the notice required by section 3062 only on the very day of its final approval of plaintiff Muller's relocation, even though the new proposed location had been known to both plaintiffs for several months. Likewise, plaintiff General Motors broached the subject of compliance with the Act to plaintiff Fox only on the eve of the latter's enfranchisement, then, after

securing Fox's full acceptance of all risks, deliberately ignored the franchisor notice requirement of the Act.

If a state court construction of the Act were explicitly to recognize that franchisors could time their notice of proposed action to occur, not necessarily "long before consumating their transactions" (Exhibit A, p. 37), but at some point prior to the proposed franchisee's first day of business, the determinants of the question whether a hearing is required prior to issuance of the Board's notification would "at least substantially change the nature of the problem" presented in plaintiffs' claim (*Harrison* v. *N.A.A.C.P.* (1959) 360 U.S. 167, 177) so as to render abstention appropriate. (*Bellotti* v. *Baird, supra,* 428 U.S. 132, 147–148.)

Any of the foregoing interpretations of the California statute could result from an authoritative state construction. Any one of the foregoing interpretations of the statute, if adopted by a state appellate court, would substantially alter the federal issue with which the District Court has dealt in this case.

This Court has additionally made it clear that the propriety of *Pullman*-type abstention is unimparied even by the absence of any extant state court construction based upon state law. Indeed it is specifically the existence of *unresolved* issues of state law which renders abstention a proper exercise of federal judicial restraint. (*Bellotti* v. *Baird, supra,* 428 U.S. 132 at 146–147.) In *Bellotti,* this Court ordered a three-judge district court to abstain from deciding the constitutionality of a Massachusetts statute requiring

parental consent for performance of an abortion on an unmarried woman under age eighteen. Rejecting the assertion that Massachusetts' highest court would inevitably construe the statute as the district court had, the court stated:

> "Whether the Supreme Judicial Court will so interpret the statute, or whether it will interpret the statute to require consideration of factors not mentioned above, imposed burdens more serious than those suggested, or create some unanticipated interference with the doctor-patient relationship, we cannot now determine.[16] Nor need we determine what factors are impermissible or at what point review of consent and good cause in the case of a minor becomes unduly burdensome. *It is sufficient that the statute is susceptible of the interpretation offered by appellants, and we so find, and that such an interpretation would avoid or substantially modify the federal constitutional challenge to the statute, as it clearly would.* Indeed, in the absence of an authoritative construction, it is impossible to define precisely the constitutional question presented." (428 U.S. at 147–148. (Emphasis added; footnote omitted).)

Likewise, in *Harris County Commissioners Court* v. *Moore, supra,* this Court reversed a decision of a three-judge district court which had held a Texas redistricting statute a denial of equal protection. In the absence of a state judicial pronouncement upon unsettled relationships between the state constitution and the challenged statute, the Court held abstention appropriate and, "[i]n order to remove any possible

obstacles to state court jurisdiction," ordered the district court to dismiss the complaint. (420 U.S. at 88.)

Appellants in the present case have demonstrated the existence of three separate issues of state law, resolution of any one of which in a state construction of the statute would at the very least "substantially modify the federal constitutional challenge to the statute" (*Bellotti, supra,* 428 U.S. at 148.), if not obviate a federal constitutional ruling altogether, while preserving the statute in its present form.[4] As in *Bellotti, supra,* it is impossible to foretell the direction which an authoritative state construction may take, yet the clear teaching of *Bellotti* is that that direction need not be known to render abstention both prudent and proper.

CONCLUSION

The issues presented by this appeal arise from two areas of law to which this Court has recently given its careful consideration. The opinion and judgment which have issued from the learned three-judge court

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[4] Previously, on application to this Court for a stay of the District Court's judgment, appellants have additionally pointed out the possibility that the state courts could themselves invalidate the Act on the basis of substantive challenges now pending in the California Court of Appeal for the Third Appellate District in *Toyota Motors Distributors* v. *State of California, et al.* (3d Civil No. 16429) and *Fresno Imports, Inc.* v. *State of California, et al.* (3d Civil No. 16430). Such a holding, resulting from application of state law to the issues of the propriety of the Act as an exercise of the State's police power and the validity of delegation of power by the legislature, would of course obviate a federal ruling on the adequacy of the Board's procedure under the Act. (*Reetz* v. *Bozanich, supra,* 397 U.S. at 86–87.)

in this case, and which touch most directly upon these two areas, are at radical variance with the principles reflected in the recent pronouncements of this Court. They are substantial questions which require this Court's attention.

Dated: DEC 9 - 1977

Respectfully submitted,

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Attorney General of the State of California

ROBERT L. MUKAI
Deputy Attorney General
Counsel for Appellant New Motor Vehicle Board of the State of California

STEPHEN J. EGAN
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Counsel for Appellants Department of Motor Vehicles of the State of California, and Herman Sillas, Director of the Department of Motor Vehicles of the State of California

EXHIBIT A

FILED
September 14, 1977
Clerk, U.S. District Court
Central District of California
By _____ Deputy

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

NO. CV 76-1200-WPG

ORRIN W. FOX CO., a corporation, MULLER CHEVROLET, a corporation, and GENERAL MOTORS CORPORATION,

Plaintiffs,

vs.

NEW MOTOR VEHICLE BOARD OF THE STATE OF CALIFORNIA; MELICIO H. JACABAN, AUDREY B. JONES, JOHN D. BARNES, JOHN ONESIAN, WINFIELD J. TUTTLE and JOHN B. VANDENBERG, as members of the New Motor Vehicle Board; SAM W. JENNINGS, as Executive Secretary of the New Motor Vehicle Board; DEPARTMENT OF MOTOR VEHICLES OF THE STATE OF CALIFORNIA; and HERMAN SILLAS, as Director of the Department of Motor Vehicles,

Defendants.

MEMORANDUM OF DECISION

Before ELY, Circuit Judge, and
GRAY and TAKASUGI, District Judges
WILLIAM P. GRAY, District Judge.

Plaintiffs General Motors Corporation and two retail automobile dealers in Southern California seek of this three-judge court a declaratory summary judgment that the California Automobile Franchise Act is unconstitutional on its face and as administered, and they seek a consequent injunction. This court has

jurisdiction under 28 U.S.C. §§ 1331(a), 1337, 1343(3), and 2201. For reasons stated in this opinion, the requested relief will be granted.

The California governmental body now designated as the New Motor Vehicle Board (the Board) was created within the Department of Motor Vehicles by statute in 1967 and given responsibility for the licensing of new car dealers (California Vehicle Code §§ 3000 *et seq.*). In 1973, the California Automobile Franchise Act (the Act) added §§ 3060 to 3069 to the Vehicle Code, thereby giving the additional powers and functions to the Board that are challenged in this action.

Section 3062 provides that before an automobile manufacturer (franchisor) may establish an additional motor vehicle dealership (franchisee) or relocate an existing dealership, the franchisor must first give written notice of such intention to the Board and to each dealer for the same "line-make" of automobile within the "relevant market area." Such area is defined as ". . . any area within a radius of 10 miles from the site of a potential new dealership." (Vehicle Code § 507).

Any dealer receiving such notice may, within fifteen days thereafter, file with the Board a protest to the establishing or relocating of the dealership. When such a protest is filed, the Board is obliged automatically to issue an order to the franchisor that the proposed establishment or relocation of the franchisee may not take place pending a hearing on the merits of the protest and a final decision by the Board.

It is a misdemeanor for a franchisor to establish or relocate a franchisee in violation of an order of the Board (Vehicle Code §§ 11713.2(1) and 40000.11), and such violation is grounds for suspension or revocation of the license of a manufacturer or dealer to do business

in California (Vehicle Code § 11705(a)(10)).

Section 3066(a) provides that, "Upon receiving a notice of protest," the Board shall issue an order fixing a time for the hearing, which shall be commenced within sixty days following such order. As the foregoing describes, the receipt by the Board of a protest automatically triggers both the order staying the proposed action by the franchisor and the order setting the hearing. The statute does not specify clearly that the same communication shall contain both orders or, if not, when one shall be issued in relation to the other. Although in the present instance concerning plaintiff Orrin W. Fox Co., the Board waited six weeks after issuing the injunction (on May 29) before it sent out the order setting the hearing (on July 8), we are inclined to interpret the Act as requiring the injunction and the order to be promulgated concurrently.

The hearing may be conducted by the Board or by a hearing officer designated by the Board. Testimony of witnesses and documentary evidence may be presented by the parties, as well as by "other interested individuals and groups." (Vehicle Code § 3066(a)).

If the matter is heard by the Board and the Board fails to act within thirty days after such hearing, the proposed action is deemed to be approved (§ 3067). If the matter is heard by a hearing officer, he is required to prepare and submit in writing a proposed decision to the Board (Government Code § 11517(b)), and there is no time limit within which this must be accomplished. The Board may affirm or reverse the decision of the hearing officer, and, once again, if the Board does not act within thirty days, the proposed establishment or relocation of the franchisee is deemed approved (Vehicle Code § 3067). However, the Board may also decide to take additional evidence or refer the

matter back to the hearing officer for further proceedings (Government Code § 11517(c)), in which event there is no time limit imposed other than the requirement that the decision be made ". . . within such . . . period as may be necessitated . . ." by the additional proceedings (Vehicle Code § 3067).

Thus, by the simple means of filing a protest, an automobile dealer can prevent a new competitor from being established, or an existing competitor from being relocated in new facilities, within ten miles of the protesting dealer for at least ninety days plus as long as it may take for a hearing officer to submit in writing a proposed decision and for the accomplishment of such additional proceedings as the Board may direct. Plans to establish a dealership in a particular location necessarily involve commitments for the purchase or lease of real property, construction or alteration of premises, and for the acquiring of personnel, equipment and stock in trade. Bearing these things in mind, an actual or potential delay of three months, and perhaps much more, brought about by the filing of a protest could seriously hamper or even completely destroy the consummation of such plans.

Little imagination is needed in order to visualize how appealing such a prospect might be to a competing automobile dealer, particularly, inasmuch as his protest need not be accompanied by any showing whatever of probably success, irreparable injury if his protest is not granted, or a bond or any other undertaking.

The manner in which the passage of the Act and the administration thereof have affected the present plaintiffs is revealed in the uncontradicted affidavits and documentary exhibits submitted by the parties. The only Buick dealer in Pasadena terminated his

franchise early in 1974, and a replacement dealer had not been established until May 1975, when plaintiffs General Motors and Orrin W. Fox Co. executed a franchise agreement. Protests promptly were filed by Buick dealers located in the nearby cities of Monrovia and San Gabriel on about May 22, 1975. On May 29, 1975, the Board sent letters to General Motors advising of the protests and stating that "you may not . . . establish the proposed dealership until the Board has held a hearing as provided for in Section 3066 Vehicle Code, nor thereafter if the Board has determined that there is good cause for not permitting such additional dealership." The letter also advised that the Board would later fix a time for the hearing and would advise accordingly. On July 8, 1975, the Board assigned the dates of August 11 and 12, 1975, for the hearing.

However, as the result of requests for continuance by the protestors and by stipulation, and protracted litigation in the courts concerning the right to take pre-hearing depositions, the protests were reset for hearing on September 15, 1976. They therefore were still pending when the present action was filed, on April 13, 1976.

The foregoing recital shows that, under the provisions of the Act, the protesters were able to prevent plaintiff Fox from being established as a potential (although geographically rather remote) competitor for more than fifteen months (including the entire 1976 Buick model year), without any official consideration being given to the merit or lack of merit of the protests. Fox understandably assesses at many thousands of dollars its damages occasioned by such delay.

Plaintiff Muller Chevrolet took over an existing

dealership in the Montrose section of Glendale in 1973. It soon became apparent to Muller that its physical facilities were completely inadequate and rapidly deteriorating and that a move to a new and much larger location was mandatory. In December 1974, Mr. Muller learned that the location of the current Volkswagen dealership in the adjacent community of La Canada might become available. Negotiations were begun that were contingent upon the Volkswagen dealer finding a new site for his operation, and upon the ability of the parties to finance their respective moves. After a year of complex and time consuming negotiations, an agreement was reached in December 1975 and the required notice of intention to relocate was served upon the Board and the surrounding Chevrolet dealers on about January 16, 1976. A few days later, Chevrolet dealers in Pasadena and Tujunga, respectively, filed with the Board letters saying, in effect, no more than "I protest," and on February 6, 1976, the Board responded by enjoining the proposed relocation pending a hearing on the protests. About two weeks later, on February 23, 1976, the Board "tentatively" set the hearing for June 23 through 25, 1976, and on April 21, 1976, issued a formal order confirming those dates. It is worthy of note here that such hearing was scheduled for a time more than four months after the injunction had been issued.

It appears from a supplemental affidavit filed by Mr. Muller on September 17, 1976, that the scheduled hearing took place before a hearing officer and that the latter rendered a decision favorable to the proposed relocation on about August 20, 1976. Then began the thirty-day waiting period within which time the Board might act upon that decision before the proposed relocation could be deemed approved and the

injunction finally lifted (Vehicle Code § 3067). On September 14, 1976, before the end of such waiting period, Muller was advised that the new leasehold premises were no longer available for his dealership because of his long failure to take possession and otherwise assume the obligations of the lease. Muller thereupon "gave up" with respect to this litigation and is starting all over again in his attempt to find a new site for his business.

We find that the hereinabove described procedures mandated by the California statute are in gross violation of the Due Process Clause of the Fourteenth Amendment. As the Supreme Court has said, the right to the liberty proclaimed by that provision of the Constitution ". . . denotes not merely freedom from bodily restraint, but also the right of the individual to contract, to engage in any of the common occupations of life, . . . and, generally, to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men." *Meyer v. Nebraska,* 262 U.S. 390, 399 (1923). Certainly, the right to grant or undertake a Chevrolet dealership and the right to move one's business facilities from one location to another are included within this protection. Of course, the right to do these things is not unlimited. Legitimate conflicting interests of other individuals and of the public as a whole often require that restrictions be imposed. The Fourteenth Amendment requires only that such restrictions be administered in accordance with the procedural safeguards that have been established over the years as constituting due process of law.

One of the basic requirements of due process is that the "liberty" of a person may be curtailed only after a hearing. *Sniadach v. Family Finance Corp.,* 395 U.S. 337

(1969); *see, Mullane v. Central Hanover Bank,* 339 U.S. 306, 313 (1950).

> "[I]t is now well settled that a temporary, nonfinal deprivation of property is nonetheless a 'deprivation' in the terms of the Fourteenth Amendment.
>
> * * *
>
> The Fourteenth Amendment draws no bright lines around 3-day, 10-day, or 50-day deprivations of property. . . . While the length and consequent severity of a deprivation may be another factor to weigh in determining the appropriate form of hearing, it is not decisive of the basic right to a prior hearing of some kind." *Fuentes v. Shevin,* 407 U.S. 67, 84–86 (1972).

Here, the plaintiffs were deprived of their rights for many months without any hearing whatever.

It is true, as the defendants point out, that there are extraordinary situations in which some valid governmental interest is at stake that justifies immediate interference with the rights of a person before a noticed hearing can be accomplished. For example, the Supreme Court has upheld statutes permitting governmental agencies summarily to seize operational control of banking institutions in serious financial difficulty. *Fahey v. Mallonee,* 332 U.S. 245 (1947). *See also, Ewing v. Mytinger & Casselberry,* 339 U.S. 594 (1950), in which a procedure for summary seizure of misbranded drugs by the Food and Drug Administration was upheld. But such procedures are justified only when a responsible public official concludes that to delay action pending a hearing would likely result in serious harm to the public. Here, there is no provision in the Act for any public official to

exercise his discretion as to whether the public interest requires that immediate action by taken in advance of a hearing; instead, the injunction automatically follows a simple protest by a competitor.

There are, of course, instances in which concepts of due process will also permit private parties to obtain judicial orders that restrain their adversaries from taking actions pending a hearing to determine whether the challenged actions should be enjoined as being in violation of the legitimate interests of the complainants. But the party seeking such a restraining order must make a persuasive showing that to delay injunctive relief until after a hearing would result in irreparable injury to him, and that he would be likely to prevail in such hearing. Even with such a showing, a pre-hearing restraining order is normally limited to ten days. *See,* for example, Rule 65(b) of the Federal Rules of Civil Procedure. There is also the normal requirement of a bond to insure the enjoined party against loss occasioned by an improvidently issued restraining order. None of these requirements of due process are provided for in the Act.

The defendants urge that the Act is not constitutionally defective in its operation because the plaintiffs could have filed and circulated their notices of intention early in their negotiations, and long before consummating their transactions, thus shortening or perhaps avoiding the delay between readiness to operate and the hearing. In the case of Muller, it appears that the negotiations for the lease of the new premises were protracted and involved many problems that were uncertain of satisfactory solution. It would hardly have been practicable for Muller to publish an intention to relocate, thus inspiring almost inevitable protest, and go through an expensive

hearing without knowing that the desired premises were available. It is also not hard to imagine the dampening effect upon the negotiations that would be imposed by the awareness of the long delay in completion of the transaction that any irresponsible protest could inherently cause.

Apart from these practical considerations, the short answer to the defendants' contention is that the plaintiffs had a constitutional right to do what they wanted to do, subject only to the restrictions of due process herein discussed.

In light of the foregoing, it is evident to us that the Act is unconstitutional as being in violation of the Due Process Clause of the Fourteenth Amendment. Having upheld the plaintiffs' challenge on this ground, it is unnecessary for us to consider their alternative claim that the Act is invalid under the Supremacy Clause of the Constitution because it is in inherent conflict with the federal antitrust laws.

However, before rendering a judgment for the plaintiffs, we must resolve an additional problem that has been troubling us from the inception of this action, namely, whether or not principles of comity require, or even permit, that we abstain from adjudicating this matter. We are fully mindful of the teaching of Justice Black, in *Younger v. Harris,* 401 U.S. 37, 44 (1971), that the notion of comity denotes ". . . a proper respect for state functions, a recognition of the fact that the entire country is made up of a Union of separate state governments, and a continuance of the belief that the National Government will fare best if the States and their institutions are left free to perform their separate functions in their separate ways." We are in complete accord with this concept, and we are aware that the courts of California are just as dedicated to preserving

the principles of the United States Constitution as are we. Our decision in this matter has been withheld for several months in the hope that one of the cases pending against the Board in state courts would result in an adjudication that would deal with the constitutional problem here presented. However, this has not occurred,* and we are obliged to act, particularly in light of the rule laid down in *Wisconsin v. Constantineau,* 400 U.S. 433, 439 (1971):

> ". . . abstention should not be ordered merely to await an attempt to vindicate the claim in a state court. Where there is no ambiguity in the state statute, the federal courts should not abstain but should proceed to decide the federal constitutional claim. . . . We would negate the history of the enlargement of the jurisdiction of the federal district courts, if we held the federal courts should stay its hand and not decide the question before the state courts decided it."

As is discussed above, we find the Act to be clearly unconstitutional, and there is no ambiguity that could be resolved in such manner as to harmonize it with the requirements of due process. Accordingly, a judgment declaring such unconstitutionality and enjoining enforcement of the provisions of the Act pertaining to

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* On May 23, 1977, the California Court of Appeal (Third District) affirmed a trial court ruling that the Act was unconsitutional because four of the nine members of the Board are required to be new car dealers, and thus presumably antagonistic to franchisors. *American Motors Sales Corp. v. New Motor Vehicle Board,* 69 C.A. 3d 983 (1977). The Legislature and the Governor promptly responded by enacting (on June 24, 1977) and approving (on July 7, 1977), an amendment to the Act which provides that only the non-new car dealer members of the Board may decide matters involving protests. The amendment made no other change in the procedures established by the Act.

protest procdure is being filed contemporaneously herewith. This opinion shall constitute findings of fact and conclusions of law, as authorized by Rule 52(a) of the Federal Rules of Civil Procedure.

DATED: September 14, 1977.

WILLIAM P. GRAY
United States District Judge

EXHIBIT B

FILED
Sep 14 1977
Clerk, U. S. District Court
Central District of California
By _____ Deputy

Entered
Sep 15 1977
Clerk, U. S. District Court
Central District of California
By _____Deputy

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
NO. CV 76-1200-WPG

ORRIN W. FOX CO., a corporation, MULLER CHEVROLET, a corporation, and GENERAL MOTORS CORPORATION,

Plaintiffs,

vs.

NEW MOTOR VEHICLE BOARD OF THE STATE OF CALIFORNIA; MELICIO H. JACABAN, AUDREY B. JONES, JOHN D. BARNES, JOHN ONESIAN, WINFIELD J. TUTTLE and JOHN B. VANDENBERG, as members of the New Motor Vehicle Board; SAM W. JENNINGS, as Executive Secretary of the New Motor Vehicle Board; DEPARTMENT OF MOTOR VEHICLES OF THE STATE OF CALIFORNIA; and HERMAN SILLAS, as Director of the Department of Motor Vehicles,

Defendants.

SUMMARY JUDGMENT

The motion of plaintiffs Orrin W. Fox Co., Muller Chevrolet and General Motors Corporation has been submitted for decision by this three-judge court after having been briefed and orally argued. In accordance with the Memorandum of Decision being filed contemporaneously herewith, and the court having found that there is no just reason for delay in the entry of judgment,

IT IS ORDERED, ADJUDGED AND DECREED that:

1. The California Automobile Franchise Act (California Vehicle Code §§ 3060–69) violates the Due Process Clause of the Fourteenth Amendment to the United States Constitution by depriving motor vehicle manufacturers and their prospective and existing dealers of liberty and property without prior notice and the opportunity to be heard.

2. The California Automobile Franchise Act violates the Due Process Clause of the Fourteenth Amendment to the United States Constitution by failing to provide for a prompt hearing on the merits following the initial peremptory deprivation of liberty and property.

3. Defendants, their agents, and any persons acting on their behalf, at their direction or under their control are hereby enjoined from taking any action to implement or enforce the Act's provisions.

4. Plaintiffs shall recover their costs herein in the amount of $_____.

DATED: September 14, 1977.

WALTER ELY
United States Circuit Judge

WILLIAM P. GRAY
United States District Judge

ROBERT M. TAKASUGI
United States District Judge

EXHIBIT C

FILED
Oct 13 3:52 PM '77
Clerk U.S. District Court
Central Dist. of Calif.
By _____

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VANDENBERG and JENNINGS

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

NO. 76 1200 WPG

ORRIN W. FOX CO., a corporation; MULLER CHEVROLET, a corporation; and GENERAL MOTORS CORPORATION,

Plaintiffs,

vs.

NEW MOTOR VEHICLE BOARD OF THE STATE OF CALIFORNIA; MELICIO H. JACABAN, AUDREY B. JONES, JOHN D. BARNES, JOHN ONESIAN, WINFIELD J. TUTTLE and JOHN B. VANDENBERG, as members of the New Motor Vehicle Board; SAM W. JENNINGS, as Executive Secretary of the New Motor Vehicle Board; DEPARTMENT OF MOTOR VEHICLES OF THE STATE OF CALIFORNIA; and HERMAN SILLAS, as Director of the Department of Motor Vehicles,

Defendants.

NOTICE OF APPEAL

Notice is hereby given that defendant New Motor Vehicle Board of the State of California hereby appeals to the Supreme Court of the United States from the judgment entered upon the docket of this Court in the above-entitled cause on September 15, 1977, as subsequently corrected pursuant to Rule 60(a) of the Federal Rules of Civil Procedure.

This appeal is taken pursuant to 28 U.S.C. § 1253.

DATED: October 13, 1977.

EVELLE J. YOUNGER
Attorney General

ROBERT L. MUKAI
Deputy Attorney General

By _____
ROBERT L. MUKAI
Deputy Attorney General
Attorneys for Defendants

EXHIBIT D

FILED
Oct 13 10:28 AM '77
Clerk U.S. District Court
Central Dist. of Calif.
By _____

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Department of Motor Vehicles

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
NO. CV 76-1200-WPG

ORRIN W. FOX CO., a corporation, MULLER CHEVROLET, a corporation, and GENERAL MOTORS CORPORATION,

Plaintiffs,

vs.

NEW MOTOR VEHICLE BOARD OF THE STATE OF CALIFORNIA; MELICIO H. JACABAN, AUDREY B. JONES, JOHN D. BARNES, JOHN ONESIAN, WINFIELD J. TUTTLE and JOHN B. VANDENBERG, as members of the New Motor Vehicle Board; SAM W. JENNINGS, as Executive Secretary of the New Motor Vehicle Board; DEPARTMENT OF MOTOR VEHICLES OF THE STATE OF CALIFORNIA; and HERMAN SILLAS, as Director of the Department of Motor Vehicles,

Defendants.

NOTICE OF APPEAL

To the Clerk of the above-entitled Court:

Please take notice that the defendants, Department of Motor Vehicles of the State of California and Herman Sillas as Director of the Department of Motor Vehicles hereby appeal to the Supreme Court of the United States from that certain partial summary judgment entered on September 14, 1977, as amended, and from all parts of said partial summary judgment.

DATED: October 14, 1977.

EVELLE J. YOUNGER
Attorney General of the State of California

STEPHEN J. EGAN
Deputy Attorney General

By _____
STEPHEN J. EGAN

EXHIBIT E

FILED
Oct 18 1977
Clerk, U.S. District Court
Central District of California
By _____

ENTERED
Oct 19 1977
Clerk, U.S. District Court
Central District of California
BY _____

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA
NO. CV 76-1200-WPG

ORRIN W. FOX CO., a corporation, MULLER CHEVROLET, a corporation, and GENERAL MOTORS CORPORATION,

Plaintiffs,

vs.

NEW MOTOR VEHICLE BOARD OF THE STATE OF CALIFORNIA; MELICIO H. JACABAN, AUDREY B. JONES, JOHN D. BARNES, JOHN ONESIAN, WINFIELD J. TUTTLE and JOHN B. VANDENBERG, as members of the New Motor Vehicle Board; SAM W. JENNINGS, as Executive Secretary of the New Motor Vehicle Board; DEPARTMENT OF MOTOR VEHICLES OF THE STATE OF CALIFORNIA; and HERMAN SILLAS, as Director of the Department of Motor Vehicles,

Defendants.

PARTIAL SUMMARY JUDGMENT

The Court on its own motion pursuant to Rule 60(a) of the Federal Rules of Civil Procedure, after conferring with counsel, hereby corrects the Summary Judgment entered September 15, 1977, by substituting therefor this Partial Summary Judgment.

Plaintiffs' motion for partial summary judgment and defendants' motion to dismiss have been submitted for decision after having been briefed and orally argued. In accordance with the Memorandum of Decision filed September 14, 1977, plaintiffs' motion for partial summary judgment is granted and defendants' motion to dismiss is denied.

Pursuant to Rule 54(b) of the Federal Rules of Civil Procedure, the Court finds that there is no just reason for delay and expressly directs the entry of a final judgment on plaintiffs' claim contained in Paragraphs 23 through 27 of the Complaint concerning the constitutionality of those provisions of the California Automobile Franchise Act which relate to the establishment and relocation of franchised motor vehicle dealerships. Accordingly,

IT IS ORDERED, ADJUDGED AND DECREED that:

1. The California Automobile Franchise Act (California Vehicle Code §§ 3060–69), insofar as its provisions relate to the establishment and relocation of franchised motor vehicle dealerships, violates the Due Process Clause of the Fourteenth Amendment to the United States Constitution by depriving motor vehicle manufacturers and their prospective and existing dealers of liberty and property without prior notice and the opportunity to be heard.

2. The California Automobile Franchise Act, insofar as its provisions relate to the establishment and relocation of franchised motor vehicle dealerships, violates the Due Process Clause of the Fourteenth Amendment to the United States Constitution by failing to provide for a prompt hearing on the merits following the initial peremptory deprivation of liberty

and property.

3. Defendants, their agents, and any persons acting on their behalf, at their direction or under their control are hereby enjoined from taking any action to implement or enforce the Act's provisions that relate to the establishment and relocation of franchised motor vehicle dealerships.

4. Plaintiffs shall recover their costs herein in the amount of $_____.

DATED: Oct. 18, 1977.

WALTER ELY
United States Circuit Judge

WILLIAM P. GRAY
United States District Judge

ROBERT M. TAKASUGI
United States District Judge

APPROVED AS TO FORM:

O'MELVENY & MYERS
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By _____
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By _____
Richard E. Crow

EXHIBIT F

FILED
Nov 17 10 06 AM '77
Clerk U.S. District Court
Central Dist. Of Calif

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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
NO. CV 76-1200-WPG

ORRIN W. FOX CO., a corporation, MULLER CHEVROLET, a corporation, and GENERAL MOTORS CORPORATION,

Plaintiffs,

vs.

NEW MOTOR VEHICLE BOARD OF THE STATE OF CALIFORNIA; MELICIO H. JACABAN, AUDREY B. JONES, JOHN D. BARNES, JOHN ONESIAN, WINFIELD J. TUTTLE and JOHN B. VANDENBERG, as members of the New Motor Vehicle Board; SAM W. JENNINGS, as Executive Secretary of the New Motor Vehicle Board; DEPARTMENT OF MOTOR VEHICLES OF THE STATE OF CALIFORNIA; and HERMAN SILLAS, as Director of the Department of Motor Vehicles,

Defendants.

NOTICE OF APPEAL

To the Clerk of the above-entitled Court:

Please take notice that the defendants, Department of Motor Vehicles of the State of California and Herman Sillas as Director of the Department of Motor Vehicles hereby appeal to the Supreme Court of the United States from that certain partial summary judgment entered on October 19, 1977, as amended, and from all parts of said partial summary judgment.

Dated: November 14, 1977.

EVELLE J. YOUNGER,
Attorney General of the
State of California

STEPHEN J. EGAN,
Deputy Attorney General

By _____
Stephen J. Egan

EXHIBIT G

FILED
Nov 21 1977

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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
NO. CV 76-1200-WPG
[THREE-JUDGE COURT]

ORRIN W. FOX CO., a corporation; MULLER CHEVROLET, a corporation; and GENERAL MOTORS CORPORATION,

Plaintiffs,

vs.

NEW MOTOR VEHICLE BOARD OF THE STATE OF CALIFORNIA; MELICIO H. JACABAN, AUDREY B. JONES, JOHN D. BARNES, JOHN ONESIAN, WINFIELD J. TUTTLE and JOHN B. VANDENBERG, as members of the New Motor Vehicle Board; SAM W. JENNINGS, as Executive Secretary of the New Motor Vehicle Board; DEPARTMENT OF MOTOR VEHICLES OF THE STATE OF CALIFORNIA; and HERMAN SILLAS, as Director of the Department of Motor Vehicles,

Defendants.

NOTICE OF APPEAL

Notice is hereby given that defendant New Motor Vehicle Board of the State of California hereby appeals to the Supreme Court of the United States from that certain partial summary judgment filed herein on October 18, 1977, and entered upon the docket of this Court in the above-entitled cause on October 19, 1977, and from the whole thereof.

This appeal is taken pursuant to 28 U.S.C. § 1253.

Dated: November 17, 1977.

EVELLE J. YOUNGER
Attorney General
ROBERT L. MUKAI
Deputy Attorney General

By ROBERT L. MUKAI

ROBERT L. MUKAI
Deputy Attorney General
Attorneys for Defendant
New Motor Vehicle Board

EXHIBIT H

EXHIBIT H

CALIFORNIA AUTOMOBILE FRANCHISE ACT

(California Vehicle Code §§ 3060–3069)

Article 4.

3060. Notwithstanding the terms of any franchise, no franchisor shall terminate or refuse to continue any existing franchise unless:

(a) The franchisee and the board have received written notice from the franchisor as follows:

(1) Sixty days before the effective date thereof setting forth the specific grounds for termination or refusal to continue.

(2) Fifteen days before the effective date thereof setting forth the specific grounds with respect to any of the following:

(i) Transfer of any ownership or interest in the franchise without the consent of the franchisor, which consent shall not be unreasonably withheld.

(ii) Misrepresentation by the franchisee in applying for the franchise.

(iii) Insolvency of the franchisee, or filing of any petition by or against the franchisee under any bankruptcy or receivership law.

(iv) Any unfair business practice after written warning thereof.

(b) The board finds that there is good cause for termination or refusal to continue, following a hearing called pursuant to Section 3066. The franchisee may file a protest with the board within 30 days after receiving a 60-day notice, or within 10 days after receiving a 15-day notice. When such a protest is filed, the board shall advise the franchisor that a timely protest has

been filed, that a hearing is required pursuant to Section 3066, and that the franchisor may not terminate or refuse to continue until the board makes its findings.

(c) The franchisor has received the written consent of the franchisee, or the appropriate period for filing a protest has elapsed.

The franchisor shall not modify or replace a franchise with a succeeding franchise if such modification or replacement would substantially affect the franchisee's sales or service obligations or investment, unless the franchisor shall have first given the board and each affected franchisee notice thereof at least 60 days in advance of such modification or replacement. Within 30 days of receipt of such notice, a franchisee may file a protest with the board and such modification or replacement shall not become effective until there is a finding by the board that there is good cause for such modification or replacement. If, however, a replacement franchise is the successor franchise to an expiring or expired term franchise, such prior franchise shall continue in effect until resolution of the protest by the board. In the event of multiple protests, hearings shall be consolidated to expedite the disposition of the issue.

3061. In determining whether good cause has been established for modifying, replacing, terminating, or refusing to continue a franchise, the board shall take into consideration the existing circumstances, including, but not limited to:

(1) Amount of business transacted by the franchisee, as compared to the business available to the franchisee.

(2) Investment necessarily made and obligations incurred by the franchisee to perform its part of the franchise.

(3) Permanency of the investment.

(4) Whether it is injurious or beneficial to the public welfare for the franchise to be modified or replaced or the business of the franchisee disrupted.

(5) Whether the franchisee has adequate motor vehicle sales and service facilities, equipment, vehicle parts, and qualified service personnel to reasonably provide for the needs of the consumers for the motor vehicles handled by the franchisee and has been and is rendering adequate services to the public.

(6) Whether the franchisee fails to fulfill the warranty obligations of the franchisor to be performed by the franchisee.

(7) Extent of franchisee's failure to comply with the terms of the franchise.

3062. In the event that a franchisor seeks to enter into a franchise establishing an additional motor vehicle dealership or relocating an existing motor vehicle dealership within or into a relevant market area where the same line-make is then represented, the franchisor shall in writing first notify the board and each franchisee in such line-make in the relevant market area of his intention to establish an additional dealership or to locate an existing dealership within or into that market area. Within 15 days of receiving such notice or within 15 days after the end of any appeal procedure provided by the franchisor, any such franchisee may file with the board a protest to the establishing or relocating of the dealership. When such a protest is filed the board shall inform the franchisor that a timely protest has been filed, that a hearing is required pursuant to Section 3066, and that the franchisor shall not establish or relocate the proposed

dealership until the board has held a hearing as provided in Section 3066, nor thereafter, if the board has determined that there is good cause for not permitting such dealership. In the event of multiple protests, hearings may be consolidated to expedite the disposition of the issue.

For the purposes of this section, the reopening in a relevant market area of a dealership that has not been in operation for one year or more shall be deemed the establishment of an additional motor vehicle dealership.

NOTE

Section 3062 was amended during the 1977 legislative session, effective January 1, 1978, to exclude from its operation "any relocation which is less than one mile from the existing location of the dealership and which is to a location within the same relevant market area within the same city where the existing dealership is located." (Cal.Stats. 1977, ch. 880 § 1.)

Good Cause

3063. In determining whether good cause has been established for not entering into or relocating an additional franchise for the same line-make, the board shall take into consideration the existing circumstances, including, but not limited to:

(1) Permanency of the investment.

(2) Effect on the retail motor vehicle business and the consuming public in the relevant market area.

(3) Whether it is injurious to the public welfare for an additional franchise to be established.

(4) Whether the franchisees of the same line-make in that relevant market area are providing adequate competition and convenient consumer care for the motor vehicles of the line-make in the market area

which shall include the adequacy of motor vehicle sales and service facilities, equipment, supply of vehicle parts, and qualified service personnel.

(5) Whether the establishment of an additional franchise would increase competition and therefore be in the public interest.

3064. (a) Every franchisor shall specify to its franchisees the delivery and preparation obligations of such franchisees prior to delivery of new motor vehicles to retail buyers. A copy of the delivery and preparation obligations, which shall constitute the franchisee's only responsibility for product liability between the franchisee and the franchisor but which shall not in any way affect the franchisee's responsibility for product liability between the purchaser and either the franchisee or the franchisor, and a schedule of compensation to be paid franchisees for the work and services they shall be required to perform in connection with such delivery and preparation obligations shall be filed with the board by franchisors, and shall constitute the compensation as set forth on such schedule. The schedule of compensation shall be reasonable, with the reasonableness thereof being subject to the approval of the board, providing a franchisee files a notice of protest with the board. In determining the reasonableness of the schedules, the board shall consider all relevant circumstances, including, but not limited to, the time required to perform each function that the dealer is obligated to perform and the appropriate labor rate.

(b) Upon delivery of the vehicle, the franchisee shall give a copy of the delivery and preparation obligations to the purchaser and a written certification

that he has fulfilled these obligations.

3065. (a) Every franchisor shall properly fulfill every warranty agreement made by it and adequately and fairly compensate each of its franchisees for labor and parts used to fulfill such warranty when the franchisee has fulfilled warranty obligations of repair and servicing and shall file a copy of its warranty reimbursement schedule or formula with the board. The warranty reimbursement schedule or formula shall be reasonable with respect to the time and compensation allowed the franchisee for the warranty work and all other conditions of such obligation. The reasonableness thereof shall be subject to the determination of the board; provided that a franchisee files a notice of protest with the board.

(b) In determining the adequacy and fairness of such compensation, the franchisee's effective labor rate charged to its various retail customers may be considered together with other relevant criteria.

(c) If any franchisor disallows a franchisee's claim for a defective part, alleging that such part, in fact, is not defective, the franchisor shall return such part so alleged not to be defective to the franchisee at the expense of the franchisor, or the franchisee shall be reimbursed for the franchisee's cost of the part, at the franchisor's option.

(d) All such claims made by franchisees hereinunder shall be either approved or disapproved within 30 days after their receipt by the franchisor. When any such claim is disapproved, the franchisee who submits it shall be notified in writing of its disapproval within such period, and each notice shall state the specific grounds upon which the disapproval is based. All claims made by franchisees under this

section and Section 3064 for such labor and parts shall be paid within 30 days following approval. Failure to approve or pay within the above specified time limits, in individual instances for reasons beyond the reasonable control of the franchisor, shall not constitute a violation of this article.

3066. (a) Upon receiving a notice of protest pursuant to Section 3060, 3062, 3064, or 3065, the board shall fix a time, which shall be within 60 days of such order, and place of hearing and send by registered mail a copy of the order to the franchisor, the protesting franchisee, and all individuals and groups which have requested notification by the board of protests and decisions of the board. The board, or a hearing officer, designated by the board, shall hear and consider the oral and documented evidence introduced by the parties and other interested individuals and groups and the board shall make its decision solely on the record so made. Government Code Sections 11507.6, 11507.7, except subdivision (c), 11510, 11511, 11513, 11514, 11515 and 11517 shall be applicable to such proceedings.

(b) In any hearing on a protest filed pursuant to Section 3060 or 3062, the franchisor shall have the burden of proof to establish that there is good cause to modify, replace, terminate, or refuse to continue a franchise. The franchisee shall have the burden of proof to establish there is good cause not to enter into a franchise establishing or relocating an additional motor vehicles dealership.

(c) In any hearing on a protest filed pursuant to Section 3064 or 3065, the franchisee shall have the burden to establish that the schedule of compensation or the warranty reimbursement schedule is not reasonable.

NOTE

Section 3066 was amended during the 1977 legislative session, effective July 8, 1977, to add new subdivision (d), which provides as follows:

"(d) No member of the board who is a new motor vehicle dealer may participate in, deliberate on, hear or consider, or decide, any matter involving a protest filed pursuant to this article." (Cal.Stats. 1977 ch. 278 § 3.)

3067. The decision of the board shall be in writing and shall contain findings of fact and a determination of the issues presented. If the board fails to act within 30 days after such hearing, within 30 days after the board receives a proposed decision where the case is heard before a hearing officer alone, or within such period as may be necessitated by Section 11517 of the Government Code or as may be mutually agreed upon by the parties, then the proposed action shall be deemed to be approved. Copies of the decision shall be delivered to the parties personally or sent to them by registered mail, as well as to all individuals and groups, which have requested notification by the board of protests and decisions by the board. The decision shall be final upon its delivery or mailing and no reconsideration or rehearing shall be permitted.

3068. Either party may seek judicial review of final decisions of the board. Time for filing for such review shall not be more than 45 days from the date on which the final order of the board is made public and is delivered to the parties personally or is sent them by registered mail.

3069. The provisions of this article shall be applicable to all franchises existing between dealers and manufacturers, manufacturer branches,

distributors and distributor branches at the time of its enactment and to all such future franchises.

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